IN THE
SUPREME COURT OF MISSOURI

No. SC85247

HEATHER BLAIR, a minor, by and through her Next Friend, Carla Snider,

Plaintiff/Appellant,

-vs-

PERRY COUNTY MUTUAL INSURANCE COMPANY
and
FMH MUTUAL INSURANCE COMPANY,

Defendants/Respondents

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Oral Argument Requested

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JURISDICTIONAL STATEMENT

This appeal arises from summary judgment entered in favor of Defendants/Respondents Perry County Mutual Insurance Company and FMH Mutual Insurance Company and against Plaintiff/Appellant Heather Blair on Plaintiff's action for equitable garnishment to collect a judgment entered on behalf of Plaintiff and against an alleged insured of Defendants in the amount of Two Hundred Thousand Dollars ($200,000.00). Legal File (hereinafter "LF") 6-11. Heather Blair brought both the pending suit and the underlying case on which she based her garnishment action in the Circuit Court of Perry County, Missouri. LF at 6-11. In the trial court below, the Honorable John W. Grimm entered summary judgment in favor of Respondents. Appendix at A1; LF at 287; See also LF at 127-177. Appellant filed her Notice of Appeal in the time provided by law. LF at 288-290.

The Missouri Court of Appeals, Eastern District, heard the appeal. After withdrawing its initial Opinion, the Eastern District issued its final Opinion affirming the judgment of the trial court. Appendix at A2. The Court of Appeals, Eastern District, denied plaintiff's Motion for Rehearing and Application to Transfer. Thereafter, this Court granted plaintiff's Application for Transfer filed with this Court. As the Opinion of the Missouri Court of Appeals, Eastern District, directly conflicts with an opinion of this Court, this case falls within the appellate jurisdiction of the Supreme Court of Missouri. Mo.Const. Art. V, § 10.

STATEMENT OF FACTS

This cause is before this Court following the grant of summary judgment in favor of Respondents Perry County Mutual Insurance Company[1] and FMH Mutual Insurance Company[2] in a garnishment action brought by Appellant Heather Blair in the Circuit Court of Perry County. The garnishment action arose from injuries sustained by Heather Blair on real estate owned by Aileen Fiedler in Perry County Missouri. On October 21, 1998, Heather fell from a treehouse located at Hilltop Trailer Court. LF at 6-12.

Heather Blair filed suit against Fiedler in the Circuit Court of Perry County, Missouri.[3] LF at 30-33. Ostensibly, Respondent PCMIC, in conjunction with Respondent FMH, provided a policy of insurance to Fiedler. LF at 147. However, both insurers denied coverage on the basis of nonpayment of the policy premium. LF at 271, 273-275.[4] Pursuant to Section 537.065, Heather contracted with Fiedler to limit her recovery to the policy of insurance issued to Fiedler by Respondents. LF at 205-207; See Section 537.065 R.S.Mo. (2000). The Circuit Court of Perry County entered judgment against Fiedler in the

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[1]Hereinafter "Respondent PCMIC."

[2]Hereinafter "Respondent FMH."

[3]*Carla Snider, as Natural Mother and Next Friend of Heather Blair, a minor, v. Aileen Fiedler, d/b/a Hilltop Trailer Court*, Circuit Court of Perry County, Cause No. CV799-150CC.

[4]Respondent PCMIC produced the correspondence cited herein in response to a Request for Production served upon Respondent PCMIC by Heather Blair. See LF at 216-219, specifically, Request No. 5.

amount of $200,000.00, but limited collection of the judgment to applicable insurance proceeds. LF at 47-49, 141-143.

I. The Parties

Appellant Heather Blair is a nine year old girl. LF at 141. In October 1998, Heather Blair lived with her mother, Carla Snider, at Hilltop Trailer Court in Perry County, Missouri. LF at 141. On October 21, 1998, Heather fell from a treehouse located at Hilltop Trailer Court. LF at 141. As a result of the fall, Heather suffered a fracture at C2 of her neck which required surgery and the placement of a halo vest to her head which restricted the movement of Heather's neck and head while the fracture healed. LF at 142.

At the time of the fall, Aileen Fiedler owned, operated, and managed Hilltop Trailer Court. LF at 141. Prior to the fall, Fiedler contracted with Respondents PCMIC and FMH to provide a policy of commercial liability insurance for Hilltop Trailer Court. LF at 159-177, 271-273; See also Appendix. Respondents PCMIC and FMH are both a Missouri Farmers Mutual Insurance Company authorized to sell policies of insurance in the State of Missouri. LF at 7, 13, 18.

II. The Policy

In April 1998, Fiedler contracted with Respondents PCMIC and FMH for a policy of commercial liability insurance for Hilltop Trailer Court in the amount of $300,000.00 per person per occurrence.[5] LF at 159-177, 233-235, 271-273; See also Appendix at A17.

[5]Respondent PCMIC's policy number was RUI-10147. LF at 105-106, 229-231,

The policy was for a one year term dated April 3, 1998 through April 3, 1999 and premiums were payable on a quarterly basis. LF at 271.

The policy contained an endorsement regarding cancellation of the policy. LF at 176. The cancellation provision contained in the policy required Respondents PCMIC and FMH to provide ten (10) days written notice prior to the effectuation of cancellation of the policy based on nonpayment of the premium. LF at 176. Specifically, the provision stated:

> "We may cancel this policy or any of its parts by mailing or delivering to the named insured a written notice before the cancellation is to take effect. The notice must be given:
>
> - Not less than 10 days before the cancellation is to take effect when the cancellation is based upon one or more of the following reasons:
>
> a. Nonpayment of premium . . . . "

Additionally, the endorsement required the notice of cancellation to state "the reasons for cancellation." LF at 176.

233-235. Respondent FMH's policy number was 4134. LF at 161.

III. Notice, Nonpayment of the Policy Premium, and the Injury of October 21, 1998

The third quarterly installment of the policy premium was due October 3, 1998. Fiedler did not pay the insurance premium by that date. LF at 128. On October 14, 1998, Respondents mailed written notice to Fiedler stating the coverage on the policy had lapsed for nonpayment of the policy premium. LF at 273-274. Seven days later, on October 21, 1998, Heather fell from the treehouse and suffered injury. LF at 141-142.

In their motion for summary judgment, Respondents claimed that a notice, titled "Notice for Payment of Premium," was mailed to Fiedler on September 14, 1998. LF at 128, 147-150. Titled simply "NOTICE OF PAYMENT DUE," the assessment notice filed with the trial court and allegedly sent to Fiedler indicates "BILLED ANNUALLY." Without dispute, Respondents billed the policy here on a quarterly basis. Additionally, the word "cancellation" cannot be found on the purported notice. Fiedler denied receipt of any notice regarding the installment premium in the underlying personal injury case. LF at 283-284, 286.

IV. Procedural History before the Trial Court

Heather Blair filed suit against Aileen Fiedler and the parties contracted to limit recovery to the policy of insurance issued to Fiedler by Respondents PCMIC and FMH. Thereafter, Heather filed a Petition for Equitable Garnishment against Respondents alleging a liability insurance policy was in full force and effect that insured Fiedler against the losses and damage assessed in the underlying personal injury suit. LF at 128. The

parties filed opposing motions for summary judgment.[6] See LF at 23-29, 127-130. The Honorable John W. Grimm granted the motion for summary judgment filed by Respondents and denied that filed by Heather. LF at 287. In so doing, the trial court did not set forth in its Order findings of fact or reasons for granting Respondents' motion for summary judgment. LF at 287; See Appendix at A1.

[6]Respondents did not, either in their Motion for Summary Judgment or their response to the motion of Heather Blair, dispute that their insurance coverage would have covered the injury suffered by Heather absent their contention that the coverage was not in effect at the time of the injury due to nonpayment of the policy premium. See LF at 102-114, 127-130.

POINTS RELIED ON

I. The trial court erred in granting summary judgment because the trial court erred in holding that an assessment notice allegedly mailed prior to the unequivocal act of nonpayment of premium served as sufficient notice to cancel an insurance policy for nonpayment of the policy premium on the premium due date in that an insurer must strictly comply with the contractual requirements set forth in the insurance policy and, here, the policy contained a cancellation provision directing that the insurer must provide written notice not less than ten days before cancellation is to take effect when the cancellation is based upon nonpayment of the premium.

Malin v. Netherlands Ins. Co., 219 S.W. 143 (Mo.App. 1920)

Dyche v. Bostian, 229 S.W.2d 25 (Mo.App. 1950)

MFA Mut. Ins. Co. v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964)

Safeco Ins. Co. of America v. Stone & Sons, Inc., 822 S.W.2d 565 (Mo.App.E.D. 1992)

II. The trial court erred in granting Respondents summary judgment because the trial court improperly held that Respondents possessed no duty to pay any benefit under the policy due merely to the failure of Aileen Fiedler to pay the quarterly installment of the policy premium in that (1) the insurance policy contained a cancellation provision with which Respondents failed to strictly comply and (2) an insurance policy "terminates" at the expiration of the policy by lapse of the policy period and, here, the policy was for a one year term expiring in April 1999, nearly six months after the occurrence involving Heather Blair.

Dyche v. Bostian, 229 S.W.2d 25 (Mo.App. 1950)

MFA Mut. Ins. Co. v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964)

Waynesville Sec. Bank v. Stuyvesant Ins. Co., 499 S.W.2d 218 (Mo.App. 1973)

Safeco Ins. Co. of America v. Stone & Sons, Inc., 822 S.W.2d 565 (Mo.App.E.D. 1992)

III. The trial court erred in granting Respondents summary judgment because there exists a genuine issue of material fact regarding whether Respondents mailed notice of cancellation to Aileen Fiedler in September 1998 in that (1) the assessment notice does not unconditionally provide notice of cancellation on the basis of nonpayment of policy premium, (2) Aileen Fiedler testified that she received no such notice, and (3) the affidavit filed by Respondents to support their contention of proof of mailing of the assessment notice failed to comply with the requirement of Rule 74.04(e) requiring the attachment or simultaneous service of sworn or certified copies of all documents referred to in the affidavit.

Ireland v. Mfrs. & Merchants Indem. Co., 298 S.W.2d 529 (Mo.App. 1957)

Gambill v. Cedar Fork Mut. Aid Soc'y, 967 S.W.2d 310 (Mo.App.S.D. 1998)

Nichols v. Mama Stuffeati's, 965 S.W.2d 171 (Mo.App.W.D. 1997)

Bakewell v. Missouri State Employees' Retirement Sys., 668 S.W.2d 224 (Mo.App.W.D. 1984)

Rule 74.04(e)

ARGUMENT

Standard of Review

To obtain summary judgment pursuant to Rule 74.04, a movant must establish the right to judgment as a matter of law and the absence of any genuine issue as to any material fact required to support the right to judgment. ITT Comm'l Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 378 (Mo.banc 1993). The burden rests with the movant to demonstrate a right to judgment flowing from material facts about which there exists no genuine dispute. Id. at 380.

Summary judgment shall be entered if the motion and response show the absence of a genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Gambill v. Cedar Fork Mut. Aid Soc'y, 967 S.W.2d 310, 311 (Mo.App.S.D. 1998). In reviewing the granting of summary judgment, the appellate court must scrutinize the record in the light most favorable to the party against whom judgment was rendered. Arbeitman v. Monumental Life Ins. Co., 878 S.W.2d 915, 916 (Mo.App.E.D. 1994); Gambill, 967 S.W.2d at 312. Where the trial court's order granting summary judgment does not state the reasons for the court so holding, the appellate court shall presume that the trial court based its decision on the grounds specified in the motion. McDowell v. Waldron, 920 S.W.2d 555, 562 (Mo.App.E.D. 1996). Appellate review of a summary judgment is essentially *de novo*. Gambill, 967 S.W.2d at 312.

I. The trial court erred in granting summary judgment because the trial court erred in holding that an assessment notice allegedly mailed prior to the unequivocal act of nonpayment of premium served as sufficient notice to cancel an insurance policy for nonpayment of the policy premium on the premium due date in that an insurer must strictly comply with the contractual requirements set forth in the insurance policy and, here, the policy contained a cancellation provision directing that the insurer must provide written notice not less than ten days before cancellation is to take effect when the cancellation is based upon nonpayment of the premium.

The assessment notice Respondents allegedly mailed to Aileen Fiedler in September 1998 was not a notice of cancellation. As a contract, an insurance policy remains subject to rules of contract construction. To unilaterally terminate a policy, a party to the contract must strictly comply with any cancellation provision contained in the policy. Here, the cancellation provision required Respondents to provide ten days written notice to Fiedler before canceling the policy on the basis of nonpayment of the premium. LF at 176. The policy required multiple events to occur before Respondents could cancel the policy on the basis of nonpayment of the premium, including (1) failure to pay the premium, (2) issuance of written notice by the insurer to Fiedler, and (3) the elapse of ten days after mailing of the notice. Equivocal and subject to change, any notice of cancellation sent prior to nonpayment of the policy premium cannot serve as notice sufficient to cancel the policy on the premium due date.

Pursuant to the policy, cancellation of the policy could not take effect earlier than October 24, 1998. See LF at 176, 273. Here, the quarterly installment of the policy premium was due October 3, 1998. LF at 128. Aileen Fiedler failed to pay the premium by that date. LF at 128. On October 14, 1998, Respondents mailed Fiedler a notice of cancellation. LF at 273. On October 21, 1998, Heather Blair fell from a treehouse at Hilltop Trailer Court and suffered an injury to her neck. LF at 141. Because Respondents first issued written notice of cancellation of the policy following nonpayment seven days prior to the occurrence involving Heather, coverage existed under the policy for damages which Heather sustained.

A. Construction of Insurance Policies.

Insurance policies are contracts. Arbeitman, 878 S.W.2d at 916. As such, the rules of contract construction apply to the construction of insurance policies. Id. Thus, a court shall interpret the terms of an insurance contract in accord with the ordinary meaning of the language used in the policy. Id.; American States Ins. Co. v. Broeckelman, 957 S.W.2d 461, 467 (Mo.App.S.D. 1997).

If an insurance policy is unambiguous, the court shall enforce the policy according to its terms. Broeckelman, 957 S.W.2d at 465. However, if the policy is ambiguous, the court shall construe the policy against the insurer. Id. The interpretation of an insurance contract and the determination of whether the language of an insurance policy is ambiguous is a question of law. Id. at 465, 467.

B. Termination of an Insurance Policy Requires Strict Compliance with any

Cancellation Provision Contained in the Policy.

Generally, the continued payment of the policy premium by an insured on or before the due date is necessary to continue the policy in force. Hyten v. Cape Mut. Ins. Co., 663 S.W.2d 430, 431 (Mo.App.S.D. 1983). However, where an insurance policy contains a specific provision for cancellation of the policy, the provision binds the parties.[7] Gambill, 967 S.W.2d at 312. A party to the policy must strictly comply with a policy provision allowing for unilateral cancellation to effectively cancel an insurance policy. MFA Mut. Ins. Co. v. Southwest Baptist College, 381 S.W.2d 797, 801 (Mo. 1964); Stone & Sons, 822 S.W.2d at 568; Nichols v. Mama Stuffeati's, 965 S.W.2d 171, 174 (Mo.App.W.D. 1997). Accordingly, Missouri courts have long recognized:

> "The law is firmly settled that, where a policy contains a specific provision for cancellation by either party, it is binding upon the parties and must be strictly complied with in order to terminate the policy."

Dyche v. Bostian, 229 S.W.2d 25, 28 (Mo.App. 1950); See also Southwest Baptist College, 381 S.W.2d at 801; Stone & Sons, 822 S.W.2d at 568; S&P Oyster Co., Inc., v. U.S.

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[7]Under Missouri law, cancellation of an insurance policy must occur: (1) under the terms of the policy or (2) by the mutual consent of the parties. Safeco Ins. Co. of America v. Stone & Sons, Inc., 822 S.W.2d 565, 568 (Mo.App.E.D. 1992). Here, Respondents made no claim before the trial court that the insurance policy issued to Aileen Fiedler was cancelled by mutual consent of the parties.

Fidelity and Guaranty Co., 865 S.W.2d 379, 382 (Mo.App.E.D. 1993). This rule shall be followed "even when the provision is 'unreasonable.'" Stone & Sons, 822 S.W.2d at 568; Blanks v. Farmers Ins. Co., Inc., 97 S.W.2d 1, 4 (Mo.App.E.D. 2002).

In Dyche, the Kansas City Court of Appeals held a workers' compensation policy to cover a work place loss where an attempt by the insured to cancel the policy failed to comply with the policy's cancellation provision. Dyche, 229 S.W.2d at 28-29. There, Massachusetts Bonding and Insurance Co. issued a workers' compensation policy for a one year term dated March 1946 through March 1947. Id. at 26. In October 1946, the insured sent a letter to an agent of the insurer identifying the policy and requesting its cancellation. Id. The letter failed to specify the date on which the cancellation was to be effective. Id. at 28. The cancellation provision directed that

> "the policy may be cancelled at any time by either of the parties upon written notice to the other party stating when, not less than ten days thereafter, cancellation shall be effective. The effective date of such cancellation shall then be the end of the Policy Period."

Id. Recognizing the rule that "where a policy contains a specific provision for cancellation by either party, it is binding upon the parties and must be strictly complied with in order to terminate the policy," the court found that the insured failed to comply with the policy's cancellation provision. Id. As such, the court concluded the policy covered an accident suffered by an employee of the insured after deliverance of the letter to the insurer. Id. at 28-29.

Likewise, in Stone & Sons, the Court of Appeals, Eastern District, held that an insurer did not cancel a commercial automobile policy prior to an automobile collision where the insurer failed to comply with the cancellation provision in that the insurer mailed the notice of cancellation to a shareholder of the insured, rather than to the insured itself, where the provision expressly directed that such notice be sent to the "named insured." Stone & Sons, 822 S.W.2d at 568-569. In that case, Safeco Insurance Company provided a commercial automobile policy to a refuse hauling business. Id. at 566-567. The policy required that the insurer mail or deliver a notice of cancellation to the named insured. Id. at 567, 568. During the term of the policy, Safeco mailed a notice of cancellation of the policy to the operator of the company. Id. at 567. The notice did not mention the named insured. Id. Recognizing that "strict compliance with all the requirements in regard to notice is a prerequisite cancellation," the Court of Appeals, Eastern District, found such notice ineffective. Id. at 568-569.

The insurance policy issued to Fiedler by Respondents contained an express cancellation provision with which Respondents had to strictly comply to cancel the policy. Dyche, 229 S.W.2d at 28; See LF at 176. Thus, this Court may find that the insurance policy did not provide coverage for the injuries sustained by Heather Blair only by holding that Respondents strictly complied with the cancellation provision contained in the policy. As will be discussed, however, Respondents failed to strictly comply with the cancellation provision.

Respondents PCMIC and FMH provided a policy of commercial liability insurance

to Aileen Fiedler for Hilltop Trailer Court. LF at 159-177, 233-235, 271-273. The policy was for a one year term dated April 3, 1998 through April 3, 1999. LF at 271. Policy premiums were payable on a quarterly basis. LF at 271. The cancellation provision contained in the policy required Respondents to provide ten (10) days written notice prior to the effectuation of cancellation of the policy based on nonpayment of the premium. LF at 176. Specifically, the provision stated:

"**AMENDATORY ENDORSEMENT**

MISSOURI

Cancellation - The cancellation provision of this policy is amended as follows:

We may cancel this policy or any of its parts by mailing or delivering to the named insured a written notice before the cancellation is to take effect. The notice must be given:

• Not less than 10 days before the cancellation is to take effect when the cancellation is based upon one or more of the following reasons:

a. Nonpayment of premium . . .

LF at 176; See also Appendix at 34. Additionally, the endorsement required the notice of cancellation to state "the reasons for cancellation." LF at 176.

Under the cancellation provision, cancellation of the policy could not occur until (1) the insured failed to pay her premium on the date due, (2) the insurer thereafter mailed to the insured written notice of cancellation due to nonpayment of the policy premium and

(3) ten days elapsed from mailing of the notice. See LF at 176. Here, the quarterly installment of the policy premium was due October 3, 1998. LF at 128. Aileen Fiedler failed to pay the premium by that date. LF at 128. The cancellation provision directed that Respondents "may cancel this policy. . . by mailing or delivering to the named insured a written notice before the cancellation is to take effect." LF at 176. According to the policy, Respondents must give such notice "[n]ot less than 10 days before the cancellation is to take effect when the cancellation is based upon. . . [n]onpayment of the premium." LF at 176. On October 14, 1998, Respondents mailed Fiedler a notice of cancellation. LF at 273. Pursuant to the policy, cancellation of the policy could not take effect earlier than October 24, 1998. LF at 176, 273. On October 21, 1998, Heather Blair fell from a treehouse at Hilltop Trailer Court and suffered injury to her neck. LF at 141.

Thus, coverage existed under the policy for any event otherwise covered which occurred within ten (10) days from the date Respondents mailed notice of cancellation following nonpayment of the policy premium. LF at 176. Ten days had not elapsed after the date Respondents mailed Fiedler notice of cancellation when Heather Blair sustained injury. Respondents failed to strictly comply with the cancellation provision contained in the insurance policy by issuing written notice of cancellation following nonpayment of the policy premium more than ten days prior to Heather Blair suffering injury. As such, the policy at issue covered the occurrence involving Heather.

C. Equivocal and Conditional, the Assessment Notice Allegedly Sent to Aileen Fiedler Prior to the Premium Due Date Cannot Serve as Sufficient Notice under the Policy

Cancellation Provision to Cancel the Policy on the Basis of Nonpayment of Premium as of the Premium Due Date.

Having first sent notice of cancellation of the policy to Aileen Fiedler on October 14, 1998, Respondents must provide coverage under the policy for the injury suffered by plaintiff on October 21, 1998. A unilateral cancellation of an insurance policy demands strict compliance with the conditions for cancellation provided in the policy. Southwest Baptist College, 381 S.W.2d at 801. Additionally, notice of cancellation must be **unconditional**, explicitly providing notice to the insured of cancellation of the policy following the happening of the cause of cancellation. According to this Court, there must be:

> "an unequivocal, unmistakable act of cancellation, *not dependent upon some future event*. . . and *a mere intention to cancel would not suffice to effect a cancellation under the policy provisions*."

Southwest Baptist College, 381 S.W.2d at 801 (emphasis added). Such rule has been the law in Missouri for more than eight decades. More than eighty years ago, the Kansas City Court of Appeals stated that an effective notice of cancellation shall state a present intent to cancel an insurance policy – **not subject to change or withdrawal** under the circumstances of the issuance of the notice. Malin v. Netherlands Ins. Co., 219 S.W. 143, 144 (Mo.App. 1920).

In Southwest Baptist College, the Supreme Court held that the insured had not cancelled a policy under the cancellation provision of a fire policy maintained with MFA

Mutual Insurance Company where the actions of the insured failed to strictly comply with the policy's cancellation provision. Southwest Baptist College, 381 S.W.2d at 803. In that case, the insured, Southwest Baptist College, purchased multiple policies with MFA to insure various buildings on campus. Id. at 799. One such policy placed $42,500 of insurance on a campus auditorium. Id. Thereafter, college administrators adopted a new insurance program. Intending to cancel all policies then maintained by the college, the business administrator wrote a letter to MFA referencing a separate policy and directing MFA to cancel the policy named in the correspondence. Id. at 800. Because college personnel were not aware of the auditorium policy at the time, the college administrator did not send a letter to MFA referencing that policy. Id. During the term of the $42,500 policy, fire destroyed the auditorium. Id.

According to the Court, the policy covered the auditorium loss because the insured failed to comply with the cancellation provision contained in the policy. The cancellation provision simply directed that the "policy shall be cancelled at any time at the request of the insured. . . . " Id. at 801. According to the business manager, the administrator would have a sent a cancellation letter on the policy had college officials known of its existence. Id. at 800. No matter concluded the Court. "There having been no cancellation by the parties under the contract provision for cancellation. . . the policy remained in full force and effect as a subsisting contract between the parties. . . . " Id. at 803.

In the trial court below, Respondents asserted that Respondent PCMIC mailed an assessment notice to Fiedler on September 14, 1998. LF at 180. According to

Respondents, the notice instructed Fiedler that "the policy would be void if the premiums were not paid" by the due date. LF at 180.

However, any assessment notice mailed by Respondents in September 1998 to Aileen Fiedler was subject to change and was equivocal. No notice mailed prior to the premium due date could serve to unequivocally cancel the policy on the basis of nonpayment of premium until the due date of the premium installment passed. The notice allegedly sent Fiedler remained subject to change under the very circumstance of the issuance of the notice. Had Fiedler paid the installment premium prior to the due date, Respondents could not cancel the insurance policy on the basis of nonpayment of premium. Under such circumstance, any cancellation notice provided by the assessment notice would have been subject to withdrawal. At most, the language on the assessment notice served only to communicate the intention of Respondents to cancel the policy under its cancellation provision should the insured fail to timely pay the installment premium.

Accordingly, any assessment notice sent prior to the premium due date cannot serve to cancel the insurance policy -- nor can such notice serve as the basis for a grant of summary judgment. The policy required Respondents to mail notice of cancellation to Fiedler informing her of cancellation not less than ten prior to the effective date of cancellation in the event of nonpayment of the installment premium. Respondents mailed such notice – on October 14, 1998. However, Heather suffered injury seven days later – prior to the effective date of cancellation pursuant to the insurance contract between Respondents and Fiedler. Dependent upon future nonpayment of the installment premium,

any notice provided in September 1998 of an intention to cancel cannot serve as sufficient notice of cancellation. See Southwest Baptist College, 381 S.W.2d at 801; Malin, 219 S.W. at 144. Much like the letter mailed by the insured to MFA in the Southwest Baptist College case, any assessment notice mailed by Respondents prior to the premium due date amounts merely to notice of an *intention* to cancel the policy should the insured fail to pay the installment premium prior to the due date.

For such reason, this Court should hold that the trial court erred in granting summary judgment to Respondents because, at the earliest, the cancellation of the policy issued by Respondents to Aileen Fiedler became effective October 24, 1998, three days after Heather Blair sustained injury on the insured premises. As such, this Court should reverse the summary judgment entered by the trial court on behalf of Respondents.

II. The trial court erred in granting Respondents summary judgment because the trial court improperly held that Respondents possessed no duty to pay any benefit under the policy due merely to the failure of Aileen Fiedler to pay the quarterly installment of the policy premium in that (1) the insurance policy contained a cancellation provision with which Respondents failed to strictly comply and (2) an insurance policy "terminates" at the expiration of the policy by lapse of the policy period and, here, the policy was for a one year term expiring in April 1999, nearly six months after the occurrence involving Heather Blair.

In their motion, Respondents PCMIC and FMH further asserted that Respondents

possessed no responsibility under the policy because Aileen Fiedler failed to pay the insurance premium when due. LF at 129. In support, Respondents cited the general rule that the continued payment of the policy premium by an insured on or before the due date is necessary to continue the policy in force. LF at 129; See Hyten, 663 S.W.2d at 431. The apparent reliance of the trial court on this rule in entering judgment on behalf of Respondents proves erroneous, however, because such dependance fails to consider the presence of an express cancellation provision *in the policy at issue here*. See LF at 287.

In Hyten, the Missouri Court of Appeals, Southern District, upheld a grant of summary judgment where the evidence indicated that the insured failed to pay his premium when due, had received notice approximately 30 days before the due date that the policy would lapse if the premium was not paid when due, and was notified by the insurer that the policy lapsed for nonpayment of premium prior to a fire for which the insured claimed coverage. Hyten, 663 S.W.2d at 431-432. There, the insured purchased a policy on a mobile home. Id. at 431. The policy at issue in that case apparently did not contain a cancellation provision defining the obligation of the insurer where the insured failed to make a periodic installment premium payment; the opinion makes no mention of any cancellation provision whatsoever. See Id. at 431. Additionally, the insured failed to file with the trial court any verified denial of the assertions put forth in the motion for summary judgment. Id.

Thus, the policy at issue in Hyten differs in at least one significant manner from the policy considered by the Court in this appeal. Unlike the Hyten policy, the policy issued by

Respondents to Aileen Fiedler contained an express cancellation provision directing how the insurer shall cancel the policy. Compare Hyten, 663 S.W.2d at 431 to LF at 176; See also Gambill, 967 S.W.2d at 312; Southwest Baptist College, 381 S.W.2d at 801; Stone & Sons, 822 S.W.2d at 568. Here, the cancellation provision demanded the insurer give notice not less then ten days before the cancellation was to take effect when the cancellation was based upon nonpayment of the policy premium. LF at 176. Contrary to the conclusion reached by the trial court, such provision necessarily requires that the only valid cancellation notice is notice provided *after* the time for making payment of the premium has expired. See Southwest Baptist College, 381 S.W.2d at 801; Malin, 219 S.W. at 144. Hyten does not instruct otherwise. Hyten, 663 S.W.2d at 430. Thus, having failed to comply with the cancellation provision, Respondents shall not now be able to avoid coverage for the incident involving Heather Blair. Dyche, 229 S.W.2d at 28; Southwest Baptist College, 381 S.W.2d at 801; Stone & Sons, 822 S.W.2d at 568; S&P Oyster Co., 865 S.W.2d at 382.

Furthermore, interpretation of the cancellation provision to permit an assessment notice sent prior to nonpayment to serve as adequate notice renders the cancellation provision contained in the insurance policy here a nullity. Under such a construction, the insurer could send at any time following formation of the insurance contract notice to its insured stating that the policy shall be void if subsequent installment premiums are not paid by the applicable due date, wait for nonpayment or late payment, provide no additional notice of cancellation, and claim cancellation of the policy as of the date of the installment

premium due date. Under such a holding, an insurer might rely on notice of cancellation served months or years prior to late or nonpayment in asserting cancellation of the policy pursuant to a cancellation provision similar to that contained in the policy here. Such rule ignores the very purpose of placing such a provision in the policy – to provide the insured with the opportunity to pay the premium or procure other insurance prior to the effective date of cancellation.

Additionally, besides dealing with the circumstance of nonpayment of premium, the provision also directs that the insurer must provided ten (10) days written notice when moving to cancel the policy on the basis of fraud or misrepresentation, changes in conditions which materially increase the hazards originally insured, insolvency of the insurer, and the involuntary loss by the insurer of reinsurance for the policy. LF at 176. The provision mandates that Respondents must provide not less than 60 days written notice when cancellation of the policy is based on "reasons other than those stated above." LF at 176. The ordinary meaning of such language supposes that some event must occur which would prompt the insurer to issue the cancellation notice. See LF at 176. A contrary reading would make the written notice useless -- afterall, the policy sets forth the various circumstances under which the insured may unilaterally cancel the policy. Therefore, this Court should hold that correspondence sent to an insured shall not serve as notice of cancellation under the policy unless such notice is mailed *after* the occurrence of some event -- here, the nonpayment of the policy premium.

Finally, Respondents PCMIC and FMH asserted before the trial court that

Respondents did not attempt to "cancel" the policy but that the policy terminated by virtue of nonpayment of the policy premium. See LF at 182. According to Respondents, nonpayment of the policy premium served to terminate, rather than cancel, the policy. LF at 182. A finding by the trial court that the policy "terminated" by virtue of the nonpayment of the premium cannot support the grant of summary judgment because the policy here did not terminate in that the installment premium due in October 1998 was the third of four installment payments due in the one year period of the policy. LF at 271-273.

"Cancellation," as used in insurance law, means termination of a policy prior to expiration of the policy period by act of one or all of the parties. Waynesville Sec. Bank v. Stuyvesant Ins. Co., 499 S.W.2d 218, 220 (Mo.App. 1973). In contrast, "termination" refers to the expiration of the policy by lapse of the policy period. Id. In Waynesville Sec. Bank, the Court found that the policy at issue "terminated" when the policy expired at the conclusion of its one year term. In that case, the policy covered a period of twelve (12) months and contained no mention of renewal or of a grace or extension period. Id. at 219-220. Accordingly, the Court found the insurer not liable for fire damage to plaintiff's trailer which occurred four days after the expiration of the policy. Id. at 220, 222.

Under the facts presented to the court below, a finding that nonpayment of the premium served to "terminate" the policy cannot support the grant of summary judgment by the trial court. Unlike the circumstance presented to the Court in Waynesville Sec. Bank, the policy here did not "terminate" by virtue of the expiration of the policy period. LF at 273, 275. The policy was for a one year term dated April 3, 1998 through April 3, 1999.

LF at 271. Policy premiums were due on a quarterly basis. LF at 271. By admission of Respondents, the policy expired on April 3, 1999. LF at 271. One such installment payment was due October 3, 1998. LF at 273. In correspondence addressed to Aileen Fiedler's counsel, Ralph Schamburg, an agent of Respondents, admitted: "We believe that it is very clear that the above policy was *cancelled* for nonpayment after it became delinquent." LF at 273 (emphasis added). Seven months earlier, Chris Schamburg of Respondent PCMIC stated to Aileen Fiedler: "we will not be able to open a claim on the above referenced policy due to cancellation of that policy. . . for non-payment of required premium." LF at 275. Thus, the policy term did not expire in October 1998.

Therefore, pursuant to the law of Missouri and the facts as presented to the trial court in the proceedings below, this Court should reverse the grant of summary judgment by the trial court to Respondents.

III. The trial court erred in granting Respondents summary judgment because there exists a genuine issue of material fact regarding whether Respondents mailed notice of cancellation to Aileen Fiedler in September 1998 in that (1) the assessment notice does not unconditionally provide notice of cancellation on the basis of nonpayment of policy premium, (2) Aileen Fiedler testified that she received no such notice, and (3) the affidavit filed by Respondents to support their contention of proof of mailing of the assessment notice failed to comply with the requirement of Rule 74.04(e) requiring the attachment or simultaneous service of sworn or certified copies of all

documents referred to in the affidavit.

Should this Court find the alleged assessment notice may serve as notice of cancellation, there exists a genuine issue of material fact regarding whether Respondents took "an unequivocal, unmistakable act of cancellation" ten days prior to the injury suffered by Heather Blair. Cancellation of an insurance policy requires "strict compliance with the conditions provided in the policy for cancellation." Nichols, 965 S.W.2d at 174. Generally, whether an insurance policy has been cancelled is a question of fact. Id. Where an insurer seeks to cancel a policy pursuant to a cancellation provision, the insurer must prove that it mailed a notice of cancellation to the insured at the address shown on the records of the insurer. Gambill, 967 S.W.2d at 312. Under Missouri law, proof of mailing requires:

> "proof that the letter was put in an envelope with sufficient postage with the correct address of the addressee recipient and was placed in the mail."

Nichols, 965 S.W.2d at 175. Testimony of an insured that she did not receive purported notice of cancellation is evidence that such notice was not mailed. Ireland v. Mfrs. & Merchants Indem. Co., 298 S.W.2d 529, 533 (Mo.App. 1957); Gambill, 967 S.W.2d at 312.

Furthermore, the terms of a document must generally be proven by production of the original of that document. Nichols, 965 S.W.2d at 174. Secondary evidence may be admitted if the offering party demonstrates that the primary evidence is lost or destroyed,

is outside the jurisdiction, is in the possession or control of an adversary or is otherwise unavailable or inaccessible. Id. However, extrinsic evidence may not be offered when the original has been destroyed, lost, or has become unavailable through the serious fault of the party offering the secondary evidence. Id.

In Gambill, the Missouri Court of Appeals, Southern District, found that evidence put forth by plaintiff in response to a motion for summary judgment supported an inference that defendant insurer had not mailed notice of cancellation as demanded by the policy. Gambill, 967 S.W.2d at 312-313. In that case, defendant's secretary testified that the insurer mailed a notice identical to an exhibit produced during discovery based on the appearance of the insured's name in the insurer's "'cash book' and a notation that the 'amount due' was $80." Id. at 311, 312. Defendant did not produce a copy of the alleged notice and could not identify the date on which defendant allegedly mailed the notice. Id. at 311. In response, plaintiff and his wife denied receiving the alleged assessment notice. Id. at 311, 312. The Court held such facts demonstrated a genuine issue as to a material fact underlying defendant's right to judgment – whether defendant mailed the alleged notice to plaintiff at the address shown on defendant's records. Id. at 313.

Here, the trial court both improperly considered the assessment notice allegedly sent by Respondents to Fiedler in September 1998 as "notice of cancellation" and ignored testimony of Fiedler that she not receive any notice of any type prior to the date Heather Blair suffered injury. First, the notice presented by Respondents to the trial court in support of their motion for summary judgment cannot constitute notice of cancellation

under the policy. The policy required Respondents to mail or deliver to the insured a "notice of cancellation" which identified "nonpayment of premium" as the reason for cancellation. LF at 176. However, the notice does not unconditionally or unequivocally provide notice of cancellation on the basis of nonpayment of the policy premium. LF at 149. Titled merely "NOTICE OF PAYMENT DUE," the assessment notice filed with the trial court states only "policy void ***if*** not paid by due date." (Emphasis added). LF at 149. The notice does not explicitly state that cancellation shall occur on any given date because of some event which previously occurred. See LF at 149.

Moreover, evidence in the record indicates the presence of a genuine issue of material fact as to whether Respondents mailed any notice. Fiedler, like plaintiff and his wife in Gambill, testified that she did not receive any notice from her insurer. In the underlying case, Fiedler testified that she never received through the mail any notice regarding the installment premium. LF at 281-284. In fact, Fiedler testified that she first learned of the purported cancellation of the policy when she went to the offices of Respondent PCMIC to report the incident involving Heather to Schamburg. LF at 284, 286. Under Ireland and Gambill, such testimony creates a genuine issue of fact regarding the issue of mailing of the assessment notice in September 1998. See Ireland, 298 S.W.2d at 533; Gambill, 967 S.W.2d at 312-313; Nichols, 965 S.W.2d at 175.

Finally, pursuant to Rule 74.04(e), the trial court should not have considered the documents attached in support of the Affidavit of Ralph Schamburg. Rule 74.04(e) directs:

"Supporting and opposing affidavits shall be made on personal

knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Rule 74.04(e). Rule 74.04(e) requires the affidavit follow substantially the same form as if the affiant were testifying. Bakewell v. Missouri State Employees' Retirement Sys., 668 S.W.2d 224, 227 (Mo.App.W.D. 1984). In ruling on a summary judgment motion, a court should not consider an affidavit failing to meet the criteria put forth in the rule. Id.

In Bakewell, the Western District reversed a grant of summary judgment, holding that the trial court improperly considered an affidavit filed in support of a summary judgment motion where the affidavit failed to comply with Rule 74.04(e). Id. There, movant filed a motion for summary judgment, relying upon a supporting affidavit and its answer and requested judicial notice of certain state regulations. Id. at 226. The affidavit filed by movant referenced and described records kept by movant relating to the underlying claim. Id. at 227. However, the affiant failed to attach sworn or certified copies of the records referred to in the affidavit and omitted to qualify the records as business records. Id. Under such circumstance, the court held that the affidavit should be disregarded and that movant failed to place the necessary documents before the court. Id. The Western District stated:

"What is absent is testimony concerning the time and mode of their preparation, their identification, and that they were kept in the regular course

of [movant's] business. The affidavit suffers a further defect in that it fails, contrary to the specific direction of Rule 74.04(e), to have attached sworn or certified copies of the records referred to in the affidavit."

Id.

The affidavit served as the only proof presented by Respondents demonstrating mailing of an assessment notice to Aileen Fiedler in September 1998. See LF at 147-149. In the affidavit, Schamburg testified, in pertinent part:

"5. That a Notice for Payment of Premium was mailed to Aileen Fiedler by depositing the same in the U.S. Mail, postage prepaid, at the last known address provided by Aileen Fiedler to this office on September 14, 1998, notifying her that premium payments were due by October 3, 1998 and that the policy would be void if premiums were not paid.

6. Attached hereto is *an exact copy* of the type of notice sent to Aileen Fiedler for premium payment and document verifying when said notice was sent."

LF at 147-148 (emphasis added). Though the proponent of the September 1998 assessment notice, Respondents did not produce to the trial court either the original or a copy of the notice allegedly sent to Aileen Fiedler in September 1998. See LF at 102-183. The Schamburg Affidavit references two documents attached thereto: "An exact copy of the type of notice sent to Aileen Fiedler" on September 14, 1998 and a "document verifying when said notice was sent." LF at 147-148. Neither document is sworn or

certified.[8] See LF at 149-150. Thus, the copies of the documents attached to the affidavit fail to comply with the requirements put forth in Rule 74.04.

Therefore, the trial court erred in considering documents attached in support of the Schamburg Affidavit. Though the affidavit generally offers that Schamburg has personal knowledge of "the facts sworn to herein" and of the insurance policies provided by respondents to Aileen Fiedler, the affidavit contains no further statement demonstrating Schamburg's competence to testify about the alleged mailing of the Notice of Payment of Premium to Fiedler in September 1998. See LF at 147-148. Indeed, the notice provided the court demonstrates on its face the unreliability of the notice and Schamburg's testimony in paragraph 5 regarding mailing of notice. See LF at 147-149. The "exact copy of the notice that was sent to Aileen Fiedler" attached to the affidavit states "BILLED ANNUALLY." LF at 147, 149. Without dispute, Respondents billed the policy here on a quarterly basis. LF at 271, 282.

Additionally, the affidavit fails to lay any foundation for consideration of the

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[8]In addition, neither Respondent produced a copy of either of these documents to Heather Blair during discovery despite a Request for Production served on each demanding "Any correspondence or notices between [this defendant] and Aileen Fiedler, d/b/a Hilltop Trailer Court." LF at 208-263. Appellant requested the trial court strike paragraphs 5 and 6 of the Schamburg Affidavit. LF at 191. The trial court apparently denied such request. LF at 290.

documents attached to the affidavit. The affidavit fails to establish the identity of the "document verifying when [the] notice was sent," the time and mode of the preparation of both that document and the attached notice, and that both documents were kept in the regular course of Respondent PCMIC's business. See LF at 147-148. Coupled with the denial of Fiedler that she received a notice prior to the incident involving Heather, such evidence does not demonstrate the absence of a genuine issue of fact concerning whether Respondents mailed the assessment notice to Fiedler on September 14, 1998. As such, the trial court erred when the court considered, and denied to strike as prayed by Appellant, paragraphs 5 and 6 of the Schamburg Affidavit and the documents attached thereto.

Under the facts presented to the trial court in the competing motions for summary judgment, this Court should find that a genuine issue of material fact exists as to whether defendants mailed the assessment notice to Aileen Fiedler in September 1998. As such, summary judgment remains inappropriate and this Court should reverse the judgment of the trial court and remand this case to the Circuit Court of Perry County for further proceedings.

CONCLUSION

As succinctly stated by the Honorable Lawrence E. Mooney in the Dissent of the Opinion of the Court of Appeals, Eastern District, entered below, "The document that the insurance companies proffers in satisfaction of their contractual duty to notify the policy holder is not labeled as a notice of cancellation, is not worded to effect a present, unconditional cancellation, and was given before cause for cancellation existed." Appendix

at A14.

WHEREFORE, for the reasons set forth herein, Appellant Heather Blair, a minor, by and through Next Friend, Carla Snider, respectfully prays this Court make and enter its Order reversing the Judgment entered by the trial court granting Respondents' Motion for Summary Judgment and remanding this cause to the Circuit Court of Perry County for reinstatement and further proceedings and for such other and further relief as this

Court deems just and proper under the circumstances.

RESPECTFULLY SUBMITTED,

CASEY & MEYERKORD

By _____

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 9,288 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing the Brief of Appellant in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

A true copy of the foregoing has been served upon all parties by depositing the same in the United States mail, postage pre-paid, this 12th day of June, 2003, as follows: Mr. A.M. Spradling, III, Attorney at Law, 1838 Broadway, P.O. Drawer 1119, Cape Girardeau, Missouri, 63702.

CASEY & MEYERKORD

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Subscribed and sworn to before me this _____ day of June, 2003.

_____
Notary Public

My commission expires:

APPENDIX

APPENDIX

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